No. 82-1474

In the Supreme Court of the United States

OCTOBER TERM, 1983

CHARLES R. HOOVER, ET AL., PETITIONERS

v.

EDWARD RONWIN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTIONS PRESENTED

1. Whether a complaint alleging that Arizona's bar examiners violated Section 1 of the Sherman Act by limiting bar admissions for reasons unrelated to the applicants' legal competence may be dismissed on the ground that such concededly unauthorized conduct is immune from the Sherman Act as state action.

2. Whether the bar examiners' alleged conduct is immune from the Sherman Act under the *Noerr-Pennington* doctrine.

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INTEREST OF THE UNITED STATES

This case concerns the scope of the "state action" exemption from the federal antitrust laws, developed by this Court in *Parker* v. *Brown*, 317 U.S. 341 (1943), and subsequent cases. The United States has primary responsibility for enforcement of the antitrust laws. For that reason it has an interest in assuring that the state action doctrine is applied with regard for the principles of federalism on which it is based, and that only conduct properly characterized as action of the state as sovereign is excluded from the coverage of the Sherman Act. The United States has, accordingly, participated in most of the cases in which this Court has articulated the antitrust state action doctrine.

STATEMENT

1. Petitioners are members of the Arizona Supreme Court's Committee on Examinations and Admissions

("Committee"), which was established by the Arizona Supreme Court to examine and recommend applicants for admission to the Arizona bar. Ariz. Sup. Ct. R. 28(c). Respondent took and failed the Arizona bar examination in 1974. The Committee recommended that the Arizona Supreme Court deny him admission to the bar. (Pet. App. A2.)

The Rules of the Supreme Court of Arizona provide procedures by which an applicant aggrieved by the Committee's action may seek review. Invoking these procedures, respondent petitioned the state Supreme Court under Ariz. Sup. Ct. R. 28(c)(XII)(F)(1)(C) for review of the Committee's action.[1] He contended that it had "conducted the EXAM in an unlawful manner" in that it (i) failed to use a uniform standard in grading the essay portion, (ii) failed to file its proposed grading formula with the court within the time required by Rule 28(c)(VII)(B), (iii) set the passing score too high, and (iv) used a statistical grading approach that did "*not* measure individual performance, *per se* [and] detrimentally distorted RONWIN's overall grade * * *." Petition For Review By The [Arizona] Supreme Court at 2 (No. SB-52) (filed May 1, 1974) (lodged with the Clerk of this Court). Respondent argued to the Arizona

[1] Respondent also appears to have sought review by the Committee under Rule 28(c)(XII)(G) (see *Ronwin* v. *Committee on Examinations and Admissions*, No. 74-140, Br. in Opp. at 5 (1974 Term). Under that rule "[a]n applicant aggrieved by the failure of the Committee to award said applicant a satisfactory grade upon an examination" may obtain review by the Committee of the grading of his examination. If the Committee rules against the applicant, however, he cannot obtain review by the state Supreme Court unless at least three members of the Committee dissent. Rule 28(c)(XII)(G)(5). Review by the state Supreme Court is available under Rule 28(c)(XII)(F)(1) to "[a]n applicant aggrieved by any decision of the Committee * * * (C) [f]or any substantial cause other than with respect to a claimed failure to award a satisfactory grade upon an examination * * *."

We will refer throughout to the Rules in effect in 1974, which in relevant part may be found at 110 Ariz. XXVII.

Supreme Court that the methods used by the Committee in grading the exam "constitute[d] a method designed less to examine applicants in a relevant manner and more to control the numbers of applicants permitted to engage in the practice of law, regardless of their actual legal abilities" (*id.* at 3). Accordingly, he alleged, the Committee's actions violated his constitutional rights to due process and equal protection and his right to practice law, and constituted "a conspiracy in the restraint of trade or commerce in contravention of the Sherman Anti-Trust Act" (*id.* at 3-4). Finally, respondent contended that his experience and education qualified him for the bar regardless of the examination results (*id.* at 5). He therefore asked the court to exercise its discretionary power and admit him to the bar.

The Arizona Supreme Court denied respondent's petition. See *Ronwin* v. *Committee on Examinations and Admissions*, No. 74-140, Pet. App. A1 (1974 Term). He twice sought and was denied rehearing in that court (*id.* at A3-A4). Respondent then petitioned this Court for a writ of certiorari to review the state decision which, he asserted, deprived him of due process and equal protection. This Court denied his petition. 419 U.S. 967 (1974).[2]

2. In March 1978, respondent filed this action in the United States District Court in Arizona. He alleged that members of the Committee had conspired to restrain trade in violation of Section 1 of the Sherman Act (15 U.S.C. 1) by "artificially reducing the numbers of competing attorneys in the State of Arizona" (J.A. 10-11). To effectuate the conspiracy, he claimed, the Committee

[2] Respondent applied to retake the bar examination in July 1974, but was denied permission to do so because the Committee declined to certify that he was "mentally and physically able to engage in active and continuous practice of law" (Ariz. Sup. Ct. R. 28(c)(IV)(4)). After a formal hearing, a special committee also found him unfit. This finding was affirmed by the Arizona Supreme Court. *In re Ronwin*, 113 Ariz. 357, 555 P.2d 315 (1976), cert. denied, 430 U.S. 907 (1977).

assigned a "raw score" to each examination and then, after reviewing the raw scores, "picked a particular raw score value as equal to the passing grade of [s]eventy." By using this procedure rather than basing admission on "achievement by each Bar applicant of a pre-set standard" (J.A. 10), he charged, the Committee had imposed limitations on entry that were unrelated to the state policy of insuring competence.

The members of the Committee moved to dismiss the complaint for failure to state a claim (Fed. R. Civ. P. 12(b)(6)) and for lack of subject-matter jurisdiction. They argued that the conduct alleged was exempt from the antitrust laws under the state action doctrine of *Parker* v. *Brown*; that respondent was not injured by the conduct complained of;[3] and that the conduct complained of did not sufficiently affect interstate commerce to come within the Sherman Act jurisdiction of the federal courts. The district court granted the motion to dismiss. It held that the complaint failed to state a claim upon which relief could be granted; that the court lacked subject-matter jurisdiction; and that respondent lacked standing (Pet. App. A36).

3. The Ninth Circuit reversed the dismissal of the complaint[4] and remanded the case to the district court. Applying the test articulated by this Court in *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980), the court concluded, on the issue of state action immunity, that the complaint should not have been dismissed because "at this stage of the proceedings * * * [i]t has not been established that the alleged restraint was 'clearly articulated and affirmatively expressed as state policy'" (Pet. App. A6). No

[3] Petitioners argued that even if respondent had passed the examination he would have been refused admission on other grounds. See note 2, *supra*.

[4] The court of appeals affirmed the district court's denial of respondent's motion for recusal of the district judge (Pet. App. A16-A18).

statute or state Supreme Court rule required the challenged grading procedure. And "[t]he fact that the Arizona Supreme Court has delegated to the Committee the general authority to examine applicants to determine if they are qualified to practice law and reviews the Committee's recommendations regarding admission does not alone clothe the Committee's unilateral grading policies with blanket immunity from the antitrust laws" (Pet. App. A7). The court declined to consider whether the grading formula had been reviewed and approved by the Arizona Supreme Court, since the relevant facts had not yet been presented to the district court (*id.* at A9).

Relying on this Court's decisions in *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389, 408 (1978), and *Community Communications Co.* v. *City of Boulder*, 455 U.S. 40, 48-52 (1982), the court also rejected the Committee's argument that its status as a public body was itself dispositive of the state action issue (Pet. App. A8). The court remanded the case for a determination of the truthfulness of petitioner's allegations, and a decision whether the Arizona Supreme Court had in fact authorized the challenged grading policy.[5] It indicated that summary judgment might be available to resolve many of the issues on remand (Pet. App. A18 n.12).[6]

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[5] The court also held that respondent should be given an opportunity to prove that the Committee's actions either were "in commerce" or had an "effect on commerce," and so were within the jurisdiction of the Sherman Act (Pet. App. A11-A14). In addition, it concluded that respondent's allegation of injury was sufficient, because he "was not found mentally unfit to practice law by the Arizona Supreme Court until * * * twenty-seven months after [the] exam results [complained of] were released. If Ronwin had passed the exam, he arguably would have been able to practice law until he was found, by final decision, to be mentally unfit" (Pet. App. A14-A15; footnote omitted). Petitioners do not challenge either of these holdings.

[6] Judge Ferguson dissented. He would have held that the Arizona Supreme Court—not the Committee—was the proper defendant,

SUMMARY OF ARGUMENT

I. The district court dismissed this action on the basis of the pleadings. Fed. R. Civ. P. 12(b)(6). Whether petitioners are entitled to state action immunity as a matter of law must therefore be determined by accepting the allegations of the complaint as true. The complaint charges that petitioners have limited bar admissions in a way that is entirely unrelated to the articulated state policy of insuring competence. For that reason the court of appeals properly concluded that the complaint was improperly dismissed.

A. The state action doctrine rests on complementary principles of federalism: Congress did not intend to prohibit "state action or official action directed by a state." *Parker* v. *Brown*, 317 U.S. 341, 351 (1943). On the other hand, states may not simply authorize private conduct in restraint of trade. In applying these principles, this Court has distinguished among three types of cases. First, it has made clear that the Sherman Act does not apply at all to action by a state legislature or supreme

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since the Court had reserved to itself the power of final decision on admissions. And even if that were not so, he would not have required (as he believed the majority had) that the Committee's actions be compelled by the state. That requirement, he noted, was properly applicable only to private conduct (Pet. App. A27). Since the Committee was a state agency the proper question, under this Court's decisions in *City of Lafayette* and *City of Boulder*, was whether it had "acted 'pursuant to state policy to displace competition with regulation,' * * * and whether that policy was 'clearly articulated and affirmatively expressed'" (*id.* at A29). Under that test, Judge Ferguson concluded, the state Supreme Court's rule directing the Committee to "'examine applicants and recommend * * * for admission to practice applicants who are found by the committee to have the necessary qualifications'" was sufficient authorization for any bar admission standards and grading procedures adopted by the Committee (Pet. App. A31, A33). Judge Ferguson also stated that there was no basis for antitrust jurisdiction, since "on the facts of this case, plaintiff could not demonstrate more than the trivial impact of a curved grading system" on interstate commerce (Pet. App. A34).

court, since they hold the ultimate authority for making state policy. Second, subordinate state instrumentalities share in that immunity only when acting pursuant to a clearly articulated state policy to displace competition with state control. This rule is flexible enough to allow the delegation of discretion to state agencies; but an agency's mandate must at least authorize the kind of restraint imposed. Third, privately imposed restraints will be tolerated only if they have been compelled by the direction of the state and are " 'actively supervised' " by the state. *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980).

B. Arizona's Committee on Examinations and Admissions is a state agency under the control of the Arizona Supreme Court. That court has clearly articulated a policy of examining the competence of applicants for admission to the state bar. On the other hand, the court has made clear that admission is *not* to be limited for other reasons—*e.g.*, in order to restrict competition in favor of incumbent members of the bar. Respondent's complaint alleged that petitioners have "artificially reduc[ed] the numbers of competing attorneys in the State of Arizona" (J.S. 11) in a way that does not further the court's policy of assuring competence. If that is so—a conclusion assumed for purposes of the motion to dismiss—then petitioners have not acted in furtherance of a clearly articulated state policy, and so would not be entitled to state action immunity.

It is true that the state Supreme Court has given the Committee discretion in the grading of bar examinations. But the restraint alleged here does not concern Committee decisions about what exam answers are right or wrong, or how many correct answers are a sufficient indication of competence. The fact that the court has given the Committee discretion to act in those areas does not mean that the Committee also has discretion to impose restraints on competition that are unrelated to competence.

II. Although the complaint here was improperly dismissed, the ordinary rules of civil procedure afford ample

protection to the states' interest in conferring discretion on their bar admissions committees. Summary judgment would be appropriate if the Committee here shows, for example, that its choice of a passing raw score was simply a method of accounting for differences in the difficulty of examinations from year to year. In deciding the factual question whether the Committee's grading system furthers state policy, the district court should also take account of any evidence that the state Supreme Court has reviewed the Committee's actions.

The district court should also consider whether the rules of issue preclusion prevent relitigation of the question whether the Committee's grading system furthers state policy, since the Arizona Supreme Court has already dismissed a petition by respondent challenging the grading system.

ARGUMENT

I. THE PLEADINGS IN THIS CASE, TAKEN ALONE, DO NOT SHOW THAT PETITIONERS ARE IMMUNE FROM SHERMAN ACT LIABILITY ON STATE ACTION GROUNDS

A. State Agencies Are Entitled To Immunity Only For Actions In Furtherance Of A Clearly Articulated State Policy To Displace Competition With State Control

1. The state action doctrine rests on principles of federalism first articulated in *Parker* v. *Brown*, 317 U.S. 341 (1943). There the Court noted that the Sherman Act was intended as a broad prohibition against restraints imposed on competition by private conduct. Because Congress had not addressed state-imposed restraints in either the Act or its history, however, the Court declined to impute to Congress an intent to prohibit "state action or official action directed by a state." 317 U.S. at 351. At the same time, the Court emphasized that the states cannot immunize private restraints of trade: "a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by de-

claring that their action is lawful" (*ibid.*). These complementary concepts of federalism underlying *Parker* focus judicial scrutiny on the question whether the challenged restraint on competition is properly attributable to the decision of the state as sovereign to displace competition with state control of the conduct at issue.

But the lines between "state action," "official action directed by a state," and state-authorized private restraints (*Parker*, 317 U.S. at 351) are not always bright. Many cases will involve a mixture of statutory commands, delegated authority to subordinate governmental units, and private participation.[7] The permissibility of any given restraint will ultimately depend on the extent to which it is dictated and controlled by the state in its sovereign capacity. We turn now to an analysis of competitive restraints imposed in varying circumstances (i) by the state as sovereign, (ii) by subordinate units of state government, and (iii) by private parties.

a. *Action by the state itself.* For purposes of the state action doctrine, this Court has held that the Sherman Act does not apply to actions by the state legislature[8] (and in matters concerning regulation of the bar, the state supreme court), since they hold the ultimate authority for making state policy. Thus in *Bates* v. *State Bar of Arizona*, 433 U.S. 350, 359-360 (1977), the Court found that "the challenged restraint is the affirmative command of the Arizona Supreme Court under its Rules 27(a) and 29(a) and its Disciplinary Rule 2-101(B). That court

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[7] In *Parker*, for example, the decisive factor was that the state legislature had articulated a clear intent "to restrict competition among * * * growers and maintain prices" when it passed the Agricultural Prorate Act, and had required adherence to any marketing plan that was adopted. 317 U.S. at 346, 347. But the request for a plan had to be initiated by producers, and the plan was drafted by producers and packers serving on the program committee (*id.* at 346-347). Finally, the Commission, a state agency, was required to approve any plan (*id.* at 347).

[8] See, *e.g.*, *Parker* v. *Brown*, 317 U.S. at 350 ("the legislative command of the state").

is the ultimate body wielding the State's power over the practice of law, * * * and, thus, the restraint is 'compelled by direction of the State acting as a sovereign.'" See also *Olsen* v. *Smith*, 195 U.S. 332, 344-345 (1904).[9] This Court will not explore the motives behind, or the importance of, such an assertion of sovereign authority —much as it will not question a clear statement by Congress that it has chosen to supplant the antitrust laws. But the very fact that the state's legislature (or supreme court) has made the decision itself, rather than by delegating the matter to a lower level of government, provides assurance "that federal policy is [not] being unnecessarily and inappropriately subordinated to state policy * * *." *Bates*, 433 U.S. at 362.

b. *Action by state agencies.* "[F]or purposes of the *Parker* doctrine, not every act of a state agency is that of the State as sovereign." *City of Lafayette*, 435 U.S. at 410 (opinion of Brennan, J.); *City of Boulder*, 455 U.S. at 53-54.[10] When the restraint at issue is imposed

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[9] It has been suggested that even actions attributable to the state as sovereign should be preempted by the Sherman Act if they displace competition in a way that has adverse effects on nonresidents. See Easterbrook, *Antitrust and the Economics of Federalism*, 26 J. Law & Econ. 23, 38-39 (1983). The rationale for such a limitation is that the electoral process constrains the state legislature to protect the interests of its citizens, but citizens of other states have no power to vote against the legislators who impose restraints with extraterritorial effects (*ibid.*). Territorial limitations on state action immunity are not an issue here, however, since the challenged restraint is alleged to affect only "the numbers of competing attorneys in the State of Arizona" (J.A. 11).

Parker v. *Brown* also left open the possibility that immunity would be denied if "the state or its municipality [became] a participant in a private agreement or combination by others for restraint of trade" (317 U.S. at 351-352).

[10] Although both *City of Lafayette* and *City of Boulder* involved municipalities, it is clear that the rule they applied is not so limited. Though the county bar association in *Goldfarb* was a voluntary association, the State Bar was "'an administrative agency of the [Virginia Supreme] Court.'" *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773, 776 n.2, 790 (1975) (quoting Va. Code Ann. § 54-49

by a subordinate state agency, this Court has held that it is to be attributed to the state only if the legislature or supreme court has clearly articulated a policy to displace a particular aspect of competition with state control, and the agency has acted in furtherance of that mandate. *City of Lafayette*, 435 U.S. at 410, 413, 415 (opinion of Brennan, J.); *City of Boulder*, 455 U.S. at 54-55. It is not enough that the state has given the agency a general regulatory authority to implement a broad public interest standard (*ibid.*), or articulated a policy to displace competition in some other area of an industry's activities. Cf. *Cantor* v. *Detroit Edison Co.*, 428 U.S. 579 (1976). Such a mandate may indicate nothing more than sovereign neutrality concerning the challenged restraint—an assertion of authority too ambiguous to confer state action immunity. *City of Boulder*, 455 U.S. at 55.[13]

(1972)). See also *City of Lafayette*, 435 U.S. at 408 (opinion of Brennan, J.) ("state agencies or subdivisions of a State"). The lower courts have treated municipalities and subordinate state agencies alike. See, *e.g.*, *Caribe Trailer Systems* v. *Puerto Rico Maritime Shipping Auth.*, 475 F. Supp. 711, 720-723 (D.D.C. 1979), aff'd, No. 79-1658 (D.C. Cir. July 3, 1980), cert. denied, 450 U.S. 914 (1981); *Jordan* v. *Mills*, 473 F. Supp. 13, 15 (E.D. Mich. 1979); *United States* v. *Texas State Bd. of Public Accountancy*, 464 F. Supp. 400, 404 (W.D. Tex. 1978), aff'd as modified, 592 F.2d 919 (5th Cir.), cert. denied, 444 U.S. 925 (1979); *Star Lines, Ltd.* v. *Puerto Rico Maritime Shipping Auth.*, 451 F. Supp. 157, 166-168 (S.D.N.Y. 1978). Petitioners do not contend that the two categories should be treated differently.

[13] Neutrality on the part of the state could indicate that the ultimate policymaking body delegated to a subordinate agency the authority to regulate some aspects of an industry, without considering the possibility that the agency would impose a restraint of the type at issue. Alternatively, it could indicate that the legislature considered the restraint and was unwilling to impose it as state policy, but chose to take a neutral stance rather than specifically prohibit it. In neither case would a subordinate agency that imposes such a restraint be furthering the policy of the ultimate sovereign authority.

On the other hand, we believe that the court of appeals erred if it meant to suggest that a state agency must show that its par-

This rule recognizes the need for states to delegate to subordinate levels of government the discretion to implement state policies. For example, the Court has left open

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ticular conduct is *compelled* by the state legislative or supreme court in order to obtain state action immunity. See Pet. App. A27. That requirement, while appropriate in the case of private parties (see pages 14-16, *infra*), would confine too closely the discretion of stage agencies. Compare *Parker* v. *Brown*, 317 U.S. at 351, and *Cantor*, 428 U.S. at 592-593 (state must command, not simply authorize, private action), with *City of Boulder*, 455 U.S. at 57 (city's action may be "directed or authorized"), and *City of Lafayette*, 435 U.S. at 414 (issue is whether the State "authorized or directed" municipal action). See also *Gold Cross Ambulance & Transfer* v. *City of Kansas City*, 705 F.2d 1005, 1011-1014 & n.11 (8th Cir. 1983); *Town of Hallie* v. *City of Eau Claire*, 700 F.2d 376, 381-382 (7th Cir. 1983), petition for cert. pending, No. 82-1832; *Hybud Equipment Corp.* v. *City of Akron*, 654 F.2d 1187 (6th Cir. 1981), vacated and remanded, 455 U.S. 931 (1982), on remand, 1983-1 Trade Cas. (CCH) ¶ 65,356 (N.D. Ohio 1983); *Llewellyn v. Crothers*, 1983-1 Trade Cas. (CCH) ¶ 65,358 (D. Ore. 1983); *Stauffer* v. *Grand Lake*, 1981-1 Trade Cas. (CCH) ¶ 64,029, at 76,328-76,329 (D. Colo. 1980); *Central Iowa Refuse Systems, Inc.* v. *Des Moines Metropolitan Area Solid Waste Agency*, 557 F. Supp. 131, 135-136 (S.D. Iowa 1982). *Cf. Pueblo Aircraft Service, Inc.* v. *City of Pueblo*, 679 F.2d 805 (10th Cir. 1982), cert. denied, No. 82-352 (Jan. 10, 1983). But see *Mason City Center Assoc.* v. *City of Mason City*, 468 F. Supp. 737, 743 (N.D. Iowa 1979).

Adherence to a test of authorization (pursuant to an articulated policy determination to displace competition), rather than a test of compulsion, for acts of subordinate government agencies recognizes that the effective exercise of the states' sovereign powers in a complex modern society (i) requires the delegation of state governmental power to subordinate governmental bodies, and (ii) cannot practicably be limited to delegations by state legislatures of power to subordinate agencies solely in terms of express compulsion to perform specific tasks by precisely described means. On the other hand it also recognizes that, because subordinate governmental units are not the state itself and have no independent *Parker* immunity, the exemption applies only to agency actions that constitute the implementation of a state policy to displace competition with respect to the specific activity at issue. There is thus an obvious distinction between authorization to engage in " 'the kind of action complained of' " (*City of Boulder*, 455 U.S. at 55) and a general grant of authority that does not mention (or, as in this case, rejects) the challenged restraint on competition.

the question whether the requirement of active state supervision announced in *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980), must be met by public defendants. *City of Boulder*, 455 U.S. at 52 n.14. In the case of private defendants, that requirement assures agency participation in the details of statutory implementation. But it may be doubted whether *Midcal* intended that each state agency should in turn have its own active supervision (apart from general legislative oversight and judicial review).[12]

Nor is it an affront to state sovereignty to insist that a policy to restrain competition be laid down by the legislature (or supreme court) rather than by an agency. After all

> Congress could hardly have intended state regulatory agencies to have broader power than federal agencies to exempt private conduct from the antitrust laws. * * *
>
> [And in the latter context this] Court has consistently refused to find that regulation gave rise to an implied exemption without first determining that exemption was necessary in order to make the regulatory Act work, "and even then only to the minimum extent necessary."

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[12] The lower courts have generally declined to require active state supervision of the activities of municipalities and state agencies. See, *e.g.*, *Gold Cross Ambulance & Transfer* v. *City of Kansas City*, 705 F.2d at 1014; *Town of Hallie* v. *City of Eau Claire*, 700 F.2d at 382-383; *Gambrel* v. *Kentucky Bd. of Dentistry*, 689 F.2d 612, 620 (6th Cir. 1982), cert. denied, No. 82-1067 (Feb. 22, 1983); *Euster* v. *Eagle Downs Racing Ass'n*, 677 F.2d 992, 995-996 (3d Cir. 1982), cert. denied, No. 82-501 (Nov. 15, 1982); *Benson* v. *Arizona State Bd. of Dental Examiners*, 673 F.2d 272, 275 (9th Cir. 1982); *Llewellyn* v. *Crothers*, *supra*; *Hybud Equipment Corp.* v. *City of Akron*, 1983-1 Trade Cas. (CCH) ¶ 65,356; but see *Corey* v. *Look*, 641 F.2d 32, 36-37 (1st Cir. 1981). There may be more justification for an "active supervision" requirement where the subordinate state instrumentality is itself a participant in the market, or where the agency involved is—as in this case—composed of members of the regulated business.

Cantor, 428 U.S. at 596-597 (footnotes omitted). In the case of federal agencies, this Court's skeptical approach is nothing more than a way of determining the intent of Congress, given the assumption that it would not displace the antitrust laws without saying so explicitly or by necessary implication (*id.* at 597-598 n.37). Little more is demanded of a state when agency action is required to rest on a "clear articulation and affirmative expression" by the legislature (or supreme court) of an intent to supplant competition with the state's own regulatory policy.

The key issues in this case are thus the adequacy of the delegation, and agency compliance with it. The latter is a mixed question of fact and state law. The former, although rooted in state law, presents a question of federal law under the Sherman Act. *City of Boulder*, 455 U.S. at 52 n.15.

c. *Action by private parties.* The third category of cases (a category not germane here) involves restraints on competition imposed by private parties with "state authorization, approval, encouragement, * * * participation" or direction. *Cantor*, 428 U.S. at 592-593 (footnotes omitted). In such cases this Court has consistently made clear that private action, in order to share in the state's immunity, "must be *compelled* by direction of the State acting as a sovereign," and it must be the subject of supervision. *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773, 791 (1975) (emphasis added); *Midcal*, 445 U.S. at 104.[13] The compulsion requirement is not satisfied simply because the private actor must abide by, for example,

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[13] See *United States* v. *Southern Motor Carriers Rate Conference, Inc.*, 702 F.2d 532 (5th Cir. 1983) (en banc), petition for cert. pending, No. 82-1922; *United States* v. *Title Insurance Rating Bureau, Inc.*, 700 F.2d 1247, 1253 (9th Cir. 1983), petition for cert. pending, No. 83-154; *Sound, Inc.* v. *AT&T Co.*, 1980-2 Trade Cas. (CCH) ¶ 63,514, at 76,739-76,740 (8th Cir. 1980); Note, *Parker* v. *Brown Revisited: The State Action Doctrine After Goldfarb, Cantor, and Bates*, 77 Colum. L. Rev. 898, 913-921 (1977).

a rate schedule whose terms he (rather than the state) sets. The private party must retain no significant "freedom of choice" in either "the initiation [or the] enforcement of the program under attack." *Cantor*, 428 U.S. at 593. In announcing its "two standards for antitrust immunity" (445 U.S. at 105), *Midcal* did not, as has been suggested,[14] intend to supplant this compulsion requirement with a more lenient standard in the case of private parties. On the contrary, *Midcal* made clear that it was reiterating and reaffirming the standards adopted in prior cases. 445 U.S. at 105. With respect to private parties, those cases emphasize that *Midcal's* first "standard"—a " 'clearly articulated and affirmatively expressed' " state policy—can be satisfied only by a *requirement* that competition be restrained. Mere "authorization, approval, encouragement, or participation" by the state will not suffice. *Cantor*, 428 U.S. at 592-593 (footnotes omitted); *Parker* v. *Brown*, 317 U.S. at 351. The significance of *Midcal's* "two standards" is that compulsion alone is *not enough* to immunize private action.[15] Before the Sherman Act will be displaced, private action pursuant to state command must also be " 'actively supervised' by the State itself" (445 U.S. at 105).

This stricter compulsion standard, imposed only on private restraints, also reflects the *Parker* federalism principles. Where a private restraint results only from state compulsion, it may fairly be viewed as mere com-

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[14] See Areeda, *Antitrust Immunity For "State Action" After Lafayette*, 95 Harv. L. Rev. 435, 438 (1981).

[15] The fact that compulsion was a necessary, but not always sufficient, ground for affording a state action defense to private restraints was first indicated in *Goldfarb*, 421 U.S. at 790 (emphasis added), where this Court stated that "[t]he *threshold* inquiry in determining if an anticompetitive activity is state action of the type the Sherman Act was not meant to proscribe is whether the activity is required by the State acting as sovereign."

Whether damages can be awarded against private defendants in a case involving state compulsion but lacking state supervision remains an open question.

pliance with the *state's* decision to displace competition with state regulation. By contrast, restraints resulting from private freedom of choice are entitled to no *Parker* immunity because unlike state instrumentalities, private parties (if given an option) are expected to act in pursuit of their private interests. And the state may not frustrate federal antitrust policy by "authorizing" private parties to compete or not as they wish. That is the very choice denied them by the Sherman Act.

B. State Action Immunity Protects Only Those Committee Actions Implementing The State's Policy Of Requiring That Bar Applicants Be Competent

1. Petitioners' primary argument is that the complaint was properly dismissed because they are state officials acting pursuant to a clearly articulated state policy to supplant competition with regulation (Pet. Br. 25-62). Petitioners are correct in claiming that, as a state agency,[16] the Committee is entitled to immunity for

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[16] In their petition (Pet. 9-15), petitioners argued that their action was immune from Sherman Act review because it was "direct action by the state itself" (Pet. i, Question 1). They do not now appear to press this contention, which conflicts with this Court's holdings in *City of Lafayette*, 435 U.S. at 408 (opinion of Brennan, J.), and *City of Boulder*, 455 U.S. at 53, that subordinate state instrumentalities are not the state as sovereign, and are therefore not entitled to blanket state action immunity by virtue of their status alone. The state body empowered to set policies regulating the practice of law in Arizona is the Arizona Supreme Court. See *In re Bailey*, 30 Ariz. 407, 248 P. 29 (1926); *Bates* v. *State Bar of Arizona*, 433 U.S. at 360. Accordingly, only the state Supreme Court is the "state" for purposes of ascertaining whether *Parker* immunity applies to the restraint alleged here.

The court of appeals correctly concluded that the Committee is not the state itself, but a subordinate entity under the Supreme Court. (It did not view the Committee as a private entity, and respondent does not argue that it is.) The Committee consists of seven active members of the state bar, and was established by rule of the Arizona Supreme Court to assist that body in determining whether applicants are qualified to practice law in the state (Pet. App. A3). It has no authority other than that delegated to

conduct that furthers clearly articulated state policy. But the conduct alleged in the complaint (and admitted for purposes of the motion to dismiss) did not further—indeed, it was contrary to—the policy on bar admissions articulated by the state Supreme Court. Respondent alleged that the Committee had limited the number of applicants passing the Arizona bar examination in a manner completely unrelated to the articulated state policy of controlling lawyer competence. As this Court held in *City of Lafayette* and *City of Boulder*, however, state action immunity is not available to shield agency action that furthers no articulated state policy.[17]

a. Arizona's policy concerning the practice of law is clearly articulated in the Rules of the Arizona Supreme Court. Like other states, Arizona admits to its bar only those who are competent to practice law and who are of good moral character. Ariz. Sup. Ct. R. 28(c).[18] To implement the policy articulated in its rules, the Supreme Court created the Committee on Examinations and Admissions. The Committee was directed to test applicants'

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it by the state Supreme Court. Committee members are appointed by the Supreme Court on the recommendation of the bar's Board of Governors, and are responsible to the court, not the state bar (*ibid.*). The state bar itself is a "private entity to which all Arizona lawyers belong" (*id.* at A3-A4). See also *Hackin* v. *Lockwood*, 361 F.2d 499, 501 (9th Cir.), cert. denied, 385 U.S. 960 (1966) (the Committee is not a committee of the state bar).

[17] *City of Lafayette* held that the state's authorization of a municipal utility monopoly did not confer state action immunity on anticompetitive conduct by the municipal monopolist that was not contemplated by the state. 435 U.S. at 414-415 (opinion of Brennan, J.), *id.* at 425 (opinion of the Chief Justice). *City of Boulder* held that a general grant of authority to a home rule municipality did not articulate any policy to displace competition that would be furthered by the municipality's cable television regulations. 455 U.S. at 54-56.

[18] See, generally, *The Bar Examiners' Handbook* 16-23 (S. Duhl 2d ed. 1980). See also *Schware* v. *Board of Bar Examiners*, 353 U.S. 232, 233-234, 239 (1957).

knowledge of specified legal subjects and to recommend for admission "[a]ll applicants who receive a passing grade in the general examination * * * and who also receive a passing grade in Professional Responsibilities and who are found to be otherwise qualified under these Rules * * *." Ariz. Sup. Ct. R. 28(c)(VIII)(A).[19]

This case does not involve any challenge to that policy, or any contention that it has not been clearly articulated by the state. Respondent concedes (Br. in Opp. 10) that implementation of the state's decision to restrict the practice of law to those who demonstrate competence as measured by the bar examination necessarily restrains to some extent entry into the legal profession in Arizona. If respondent's complaint had merely alleged that the Committee tested for competence and thereby excluded some applicants,[20] it would properly have been dismissed in response to the state action defense.

What respondent in fact charged, though, was that the Committee reviewed the raw scores from the examination, and then selected a passing score that would "artificially reduc[e] the numbers of competing attorneys in the State of Arizona" (J.A. 11) in a manner that would *not* further the state Supreme Court's policy of separating competent from incompetent applicants. Instead of implementing state policy, he alleged, the Committee was acting contrary to state policy by "picking the number of applicants to be admitted by sheer manipulation of the raw scores which has no relationship to achievement" (Response to Defendants' Motion to Dismiss at 3).

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[19] This version of subsection VIII was in effect from Jan. 15, 1974 until June 15, 1976. See 110 Ariz. XXVII (1974); 113 Ariz. XXXVII (1976). Respondent incorrectly relies (Br. in Opp. 1-2) on the previous version of subsection VIII, which prescribed a passing grade of 70.

[20] Judge Ferguson may have read the complaint in this way. See Pet. App. A31. And the arguments of amici National Conference of Bar Examiners and the State Bar of California are based in large part on the erroneous assumption that this is all respondent challenged.

Petitioners do not dispute that no Arizona statute, rule, or court decision articulates a policy of limiting bar admissions on grounds unrelated to competence. On the contrary, decisions of the Arizona Supreme Court indicate a policy that bar applicants of reasonable competence and good character have a "right" to be admitted to the bar.[21] Thus, assuming the truth of the allegation that petitioners imposed a restraint unrelated to competence, the court of appeals properly concluded that petitioners had not established a state action defense.

b. Though they do not dispute (for purposes of their motion to dismiss) either the allegations of the complaint or the lack of any state policy restricting bar admissions for reasons other than competence, petitioners claim that they are entitled to immunity because the Arizona Supreme Court has given them "some measure of discretion * * * to grade [bar] examinations" (Pet. Br. 59). Their contention seems to be that once a state has conferred on an agency the discretion to regulate competition for some purpose, any exercise of the agency's discretion is immune from antitrust scrutiny.

The court of appeals did not hold, however, and respondents does not argue, that immunity is forfeited be-

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[21] *In re Klahr*, 102 Ariz. 529, 531, 433 P.2d 977, 979 (1967); *In re Ronwin*, 113 Ariz. at 358, 555 P.2d at 316; *In re Levine*, 97 Ariz. 88, 90-91, 397 P.2d 205, 206-207 (1964). See also *Baird* v. *State Bar of Arizona*, 401 U.S. 1, 8 (1971). Arizona's policy is consistent with that of other states. We are not aware of any state that has articulated a policy of limiting bar membership on grounds other than residence, experience, reasonable competence, and good character. See *The Bar Examiners' Handbook*, *supra*.

This is not to suggest that a state could not, if it chose, either (i) admit only "very highly" qualified applicants (*e.g.*, those who scored in the top ten percent on the bar examination) in order to create an elite bar, or (ii) protect the work opportunities or income of incumbent attorneys by limiting the number admitted each year. Had either of those policies (which go beyond assuring the reasonable competence and character of applicants) been articulated by the Supreme Court, the Committee would have been entitled to state action immunity in carrying it out.

cause of the way a state agency has exercised its discretion in carrying out state policy. It is not contended, for example, that the Commission has improperly decided what exam answers are right or wrong, or how many correct answers are a sufficient indication of competence. Rather, respondent claims that petitioners have decided an exogenous issue (how much competition the incumbent bar wishes), entirely outside the area of testing applicants for competence, and have simply raised the examination pass rate beyond what competence demands to effect the desired result. The mere fact that petitioners have at hand the means to effect such a restraint does not immunize their action if, as seems beyond dispute, the state Supreme Court has articulated no such policy. The same reasoning would apply to other licensing or health and safety requirements. Suppose, for example, that Arizona law required restaurants to meet minimal health and safety standards before they could get a permit to sell food to the public. A state agency charged with enforcing that requirement would not be entitled to immunity if it denied permits for reasons unrelated to health or safety in order to limit competition among restaurants.

Stated more generally, the petitioners' argument simply ignores the fact that a state policy to substitute regulation for competition in some area or aspect of a business does not entail an intent to displace competition in every aspect of that business. In *Goldfarb*, for example, Virginia had made its State Bar "the administrative agency through which the Virginia Supreme Court regulates the practice of law in that State" (421 U.S. at 776; footnote omitted). It had also granted the State Bar "the power to issue ethical opinions" (*id.* at 791), and in two such opinions the Bar had directed adherence to fee schedules. Notwithstanding the various other ways in which competition was limited in the market for legal services, this Court declined to immunize the bar's action because there was no clear indication that that particular restraint was

"compelled by direction of the State acting as a sovereign" (*ibid.*). Similarly, in both *Cantor* and *City of Lafayette* the state had articulated policies that limited competition in some utility activities, but not with respect to the particular conduct challenged.[22] So here, by adopting a policy of restricting entry to applicants who are found to be competent and of good character, Arizona did not also adopt a policy of limiting the supply of lawyers in order to restrict the supply of legal services to its citizens, or to increase the price of those services. Indeed, restrictions on admission that are unrelated to competence or character would result in exclusion of some applicants who meet the state's standards, and would thereby frustrate the state's policy of admitting all those who satisfy the articulated criteria.[23]

c. Petitioners argued in their petition (Pet. 15), though they have not pursued the matter further, that they satisfied *Midcal*'s first requirement by submitting their proposed grading formula to the state Supreme Court pursuant to Ariz. Sup. Ct. R. 28(c)(VII)(B). This contention was made in the court of appeals for the first time on petition for rehearing, and the court of appeals properly declined to consider it since the facts concerning the submission had not been presented to the district court (Pet. App. A9). If the Committee actually has limited admissions in a manner unrelated to competence (a fact assumed to be true for purposes of the motion to

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[22] Since *Cantor* involved restraints imposed by private parties, state contemplation of the alleged restraint would not have sufficed in any event to confer state action immunity. But that case, like *City of Lafayette* and *Goldfarb*, illustrates the point that a state may adopt a policy of restricting competition in an industry in some respects but not others.

[23] Petitioners' reliance on *Parker* v. *Brown* and *Euster* v. *Eagle Downs Racing Ass'n*, 677 F.2d 992 (3d Cir. 1982), cert. denied, No. 82-501 (Nov. 15, 1982), is misplaced. In *Parker* there was no allegation that agency officials had acted contrary to state policy. And in *Euster* the court found that the agency action was in furtherance of state policy. 677 F.2d at 994-995.

dismiss), there is no indication of it in the submission respondent says the Committee made (Br. in Opp. App. A2). The alleged restraint was not brought to the Supreme Court's attention. Thus mere review of and acquiescence in the Committee's action is insufficient to satisfy *Midcal*'s requirement that state policy to displace competition with its own system of regulation must be " 'clearly articulated and affirmatively expressed.' " *Midcal*, 445 U.S. at 105. As a general matter, legislative silence (or, in this case, inaction by the state supreme court) gives no clear idea about the boundaries of the area the state has undertaken to regulate. Moreover, the state's failure to react to agency conduct, like the state's failure to act in the first instance, may indicate nothing more than the absence of a consensus, a preoccupation with more pressing matters, or an indifference as to either of two contrary choices. Thus the fact that the Arizona Supreme Court may have reviewed the Committee's grading scheme cannot be taken as tacit approval of a new policy to refuse admission to competent applicants, in order to protect the trade of incumbent members of the bar.

Nor is it significant for purposes of *Midcal*'s first requirement that the state Supreme Court may on occasion review complaints lodged by unsuccessful applicants (see Pet. Br. 70-74).[24] Like review of grading procedures, review of admission denials lacks the sovereign initiative and clarity of purpose necessary to satisfy the requirements of *affirmative* expression and *clear* articulation.[25]

2. a. The National Conference of Bar Examiners ("NCBE") (Br. 5-14) contends, as did Judge Ferguson

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[24] Petitioners argue, correctly, we believe, that this fact is relevant to *Midcal*'s second requirement (*ibid.*). See also NCBE Br. 27. They do not contend that it satisfies the first.

[25] Moreover, under the Arizona Supreme Court Rules, the Committee may be able to prevent complaints about the grading of exams from reaching the state Supreme Court. Rule 28(c)(XII)(G)(5) allows the filing of a petition with the Court only if three members of the Committee dissent in writing from a decision about grading.

in the court of appeals (Pet. App. A19-A26), that allowing a Sherman Act suit against the Committee members for conduct related to the bar examination undermines Arizona's right to regulate admission to its bar. We disagree.

This Court has recognized that denying absolute Sherman Act immunity to subordinate state instrumentalities may impose some burdens on them. But it has rejected the argument that such burdens require an expansion of the state action doctrine:

> [T]his argument is simply an attack upon the wisdom of the longstanding congressional commitment to the policy of free markets and open competition embodied in the antitrust laws. * * * [J]udicial enforcement of Congress' will regarding the state-action exemption renders a State "no less able to allocate governmental power between itself and its political subdivisions. It means only that when the State itself has not directed or authorized an anticompetitive practice, the State's subdivisions in exercising their delegated power must obey the antitrust laws."

City of Boulder, 455 U.S. at 56-57, quoting *City of Lafayette*, 435 U.S. at 416. Accordingly, before a Sherman Act complaint against a subordinate state instrumentality can be dismissed on state action grounds, the court must determine that its conduct was in furtherance of state policy, and thus attributable to the state.[26]

This standard applies with equal force to an agency that controls state bar admissions. The state has an undeniable interest in regulating its bar; and state court orders regarding admissions, discipline, and disbarment must be given deference. *District of Columbia Court of Appeals* v. *Feldman*, No. 81-1335 (Mar. 23, 1983), slip op. 22 n.16. But such deference is due only to conduct

[26] Alternatively, of course, the complaint could be dismissed if the alleged conduct—even if not immune—would not violate the antitrust laws. Petitioners have made no such argument here.

that furthers policies adopted by the state legislature or supreme court. Indeed, where, as here, the state agency is a self-regulatory group composed of members of the regulated profession, there is an increased risk that its actions may be designed to further private objectives rather than those of the state.

b. NCBE also argues (NCBE Br. 12-14) that *District of Columbia Court of Appeals* v. *Feldman*, *supra*, requires dismissal of respondent's complaint.[27] *Feldman* held that the federal district courts have no jurisdiction to review action taken by the highest state (or District of Columbia) court on individual admissions applications. Because such decisions are judicial in nature, *Feldman* concluded, review is available only in this Court under 28 U.S.C. 1257. Slip op. 14-20. (The Court pointed out, however, that the district courts have jurisdiction to consider "general challenges to state bar rules, promulgated by state courts in non-judicial proceedings, which do not require review of a final state court judgment in a particular case" (*id.* at 24).)

This case, though it involves an allegation of injury to an individual applicant, entails none of the jurisdictional difficulties present in *Feldman*. In the first place, there is here no claim of error or improper action by the state supreme court.[28] On the contrary, the complaint alleges that the members of the Committee violated the Sherman Act by limiting admissions in a way not authorized by the Arizona Supreme Court.[29]

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[27] Petitioners made a similar argument in their petition (Pet. 5-8) and filed a supplemental brief on the effect of *Feldman*. They have not pursued this argument in their brief on the merits.

[28] Indeed respondent sought, and was denied, review in this Court under 28 U.S.C. 1257 of the Arizona Supreme Court's decision. *Ronwin* v. *Committee on Examinations and Admissions*, 419 U.S. 967 (1974).

[29] Nor, in our view, would it be correct to argue that an attack on the Committee's action implicitly impugns the state Supreme Court's later decision sustaining the Committee's recommendation in re-

Second, the relief sought here, unlike that in *Feldman*, is not a reversal of the state Supreme Court's denial of admission to the bar.[30] Instead, respondent seeks money damages—a remedy the Supreme Court would have been unable to afford on review of his earlier petition. Finally, quite apart from the nature of the parties and of the relief sought, respondent's claim here was brought under Section 4 of the Clayton Act (15 U.S.C. 15), and sought treble damages for a violation of Section 1 of the Sherman Act (15 U.S.C. 1). Jurisdiction over antitrust claims lies exclusively in the federal courts. See *General Investment Co.* v. *Lake Shore Ry.*, 260 U.S. 261, 287 (1922); *Feldman* v. *Gardner*, 661 F.2d 1295, 1303 (D.C. Cir. 1981), cert. denied, No. 81-1526 (June 28, 1982). The fact that respondent sought review of the denial of his admission in the state supreme court—the only place where it was

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spondent's case. The state court simply denied respondent's petition without opinion—a disposition that does not indicate approval of the action alleged in the complaint here. (The court later characterized respondent's action as a "petition for review of the grading of [his] examination papers," *In re Ronwin*, 113 Ariz. at 357, 555 P.2d at 315, a suit that would have been procedurally defective under Ariz. Sup. Ct. R. 28(c)(XII)(G)(5) unless three members of the Committee stated that the papers had been unfairly graded.)

[30] If on remand respondent were to establish an antitrust violation, he would still have to prove resultant damage, *i.e.*, that he would have passed the bar examination under a competence-based grading system (and satisfied the other prerequisites for admission). In ascertaining damages, however, the district court would not have to regrade respondent's exam or overrule any decision of the Arizona Supreme Court. If, after proving the arbitrariness of the Committee's grading policy, respondent established that his raw score would have been converted to a passing score by any reasonable conversion methodology, the district court could assume that he would have been admitted to the bar, in the absence of proof by the defendants of other grounds for disqualification. Of course, respondent would still have to prove that his earnings would have been greater during the period he would have been eligible to practice law than his actual earnings during the period, and the amount of the loss he suffered.

available—cannot deprive him of the right to present his antitrust claim to a federal forum. Federalism is, after all, a two-way street.

II. ON REMAND, THE ORDINARY RULES OF CIVIL PROCEDURE WILL AFFORD AMPLE PROTECTION TO THE STATE'S INTEREST IN CONFERRING DISCRETION ON THE AGENCY CHARGED WITH DETERMINING THE COMPETENCE OF APPLICANTS FOR BAR ADMISSION

Our conclusion that the complaint in this case was improperly dismissed is not intended to suggest that the courts should give little deference to the state's interest in using administrative agencies to carry out its public policies, or to its equally strong interest in licensing and regulating the activities of the bar. We urge only that the rules of pleading prescribed by the Federal Rules of Civil Procedure are to be interpreted in the same way in antitrust actions as in other suits, and that in its present posture this case is governed by the principle that for purposes of a motion to dismiss under Rule 12(b)(6) all the allegations of a complaint are to be taken as true. *City of Lafayette*, 435 U.S. at 403; *Control Data Corp.* v. *International Business Machines Corp.*, 421 F.2d 323, 326 (8th Cir. 1970); *Nagler* v. *Admiral Corp.*, 248 F.2d 319 (2d Cir. 1957) (Clark, J.); 5 C. Wright & A. Miller, *Federal Practice and Procedure* §§ 1221, 1228 (1969). That principle does not mean that unfounded actions cannot still be dismissed at an early stage.

1. As the court of appeals indicated, the district court should not hesitate to grant summary judgment for petitioners if uncontroverted facts show that the challenged grading procedure was in furtherance of state policy (Pet. App. A18 n.12). Here it is undisputed that Arizona's Supreme Court has articulated a policy of limiting bar admissions to reasonably competent applicants. It also contemplates use of written examinations covering

certain subjects to determine competence; its rules so provide. Ariz. Sup. Ct. R. 28(c)(VII) and (VIII). Having prescribed both the restrictive policy and the examination system, the Court delegated to the Committee the essentially technical tasks of designing the examination and deciding what raw score represents reasonable competence. The Court obviously contemplated that the Committee would exercise some discretion in carrying out its duties; a variety of possible examinations and grading systems could reasonably be expected to serve the state's purpose of determining competence. Indeed, the Court's rules provide that "[t]he Committee may utilize the Multi-State Bar Examination * * * and may utilize such grading or scoring system as the Committee deems appropriate in its discretion." Ariz. Sup. Ct. R. 28(c)(VII)(A). If the district court finds that the grading method used by the Committee was in furtherance of the state policy of limiting entry on the basis of competence, it must hold that the conduct at issue constitutes state action.[31]

Moreover, where the state has clearly indicated its intent to displace competition with state control over some

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[31] Respondent's challenge to the grading procedure is directed primarily at the selection of a passing raw score after, rather than before, the examinations have been graded and raw scores computed (J.A. 10). The record does not reveal exactly how examination scores were determined, but what respondent alleges to be a scoring system unrelated to competence may be merely a way of standardizing raw scores to account for unavoidable differences in examination difficulty from year to year. See *The Bar Examiners' Handbook*, *supra*, at 61-62, 65-70. The Committee could thus show that it uses a standardization procedure to implement the state policy of testing for competence, and that it is consequently entitled to state action immunity. The district court should not second-guess the Committee's exercise of the discretion afforded it by trying to determine whether the Committee used the "best" grading system or selected a passing score that would "most accurately" measure competence in order to decide the state action question. Even an inaccurate or erroneous exercise of state action is within the immunity.

part of a business, and the only issue is whether an agency has acted in furtherance of that policy, a finding that agency action furthers state policy as an objective matter should preclude inquiry into subjective intent. If the district court concludes that the Committee's grading method was a reasonable way to measure competence, it should not inquire whether the members (in order to promote their private interests) chose a grading method that, while reasonable, was more restrictive than necessary to further the state's policy. The restraint on competition thereby imposed would clearly be within the state's authorization, and the motives of the Committee members in imposing it would be no more relevant a subject of judicial scrutiny than the motives of members of the state legislature or Supreme Court in authorizing the restraint.

In deciding the factual question whether the Committee's grading system furthers state policy, the district court should also give considerable deference to, and may find determinative, any available evidence of the Arizona Supreme Court's own review of the Committee's actions.[32] If the Committee shows, for example, that its grading method was submitted to and approved by the state Supreme Court, this would be strong evidence that the court believed it furthered the articulated state policy

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[32] This factual issue should not be confused with the legal question about what the state's policy *is*. As this Court has made clear, the state's policy to displace competition with its own system of regulation must be "'clearly articulated and affirmatively expressed.'" *Midcal*, 445 U.S. at 105. And whether the policy has been announced "affirmatively" and with sufficient clarity is a matter of federal law. *City of Boulder*, 455 U.S. at 52 n.15. Mere review and acquiescence in agency action is insufficient to satisfy those requirements. See pages 21-22, *supra*. On the other hand, the fact that the court has reviewed the Committee's practices is evidence relevant to the factual question whether its approach to grading furthers the policy—already clearly stated—of controlling competence. The state Supreme Court is, after all, far more familiar than a federal district court would be with the Committee's operations, and with the requisite standards of proficiency for the practice of law in Arizona state courts.

of controlling competence. So would a showing that the Court dismissed respondent's petition because it believed the challenged grading system was consistent with the state's standards.[33] Any other cases in which the Court rejected similar challenges would also be relevant.

2. The district court should also consider whether the rules of issue preclusion prevent respondent from arguing that the Committee's grading system frustrates established state policy, since the Arizona Supreme Court dismissed his earlier petition challenging the grading system. In their answer in this case the Committee members raised the affirmative defense of res judicata which, construed broadly, includes issue preclusion as well as claim preclusion. *Allen* v. *McCurry*, 449 U.S. 90, 94 n.5 (1980).[34] Since the earlier state proceeding involved "'[a] claim of a present right to admission to the bar of a state and a denial of that right'" (*District of Columbia Court of Appeals* v. *Feldman*, slip op. 17, quoting *In re Summers*, 325 U.S. 561, 568 (1945)), it was a "judicial proceeding" which is entitled to full faith and credit in a federal court. 28 U.S.C. 1738. Accordingly, if the issue whether the Committee's grading system furthered state policy was actually determined against respondent in that proceeding, and if the other requirements for issue preclusion are satisfied, the same factual question may not be relitigated in this antitrust proceeding.[35]

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[33] But see note 29, *supra*.

[34] Because it dismissed the complaint on other grounds (Pet. App. A36), the district court has not yet ruled on the availability of a preclusion defense.

[35] The broader rule of claim preclusion would not apply here, since respondent's Sherman Act damage claim could not have been litigated in state court. See page 25, *supra*. Even judgments under state antitrust laws are generally held not to preclude subsequent actions under the federal antitrust laws. *Hayes* v. *Solomon*, 597 F.2d 958, 984 (5th Cir. 1979), cert. denied, 444 U.S. 1078 (1980); *Kurek* v. *Pleasure Driveway & Park District of Peoria*, 583 F.2d 378, 379 (7th Cir. 1978), cert. denied, 439 U.S. 1090 (1979);

As this Court recently noted, application of preclusion rules in the federal courts where there has been a prior state judicial proceeding serves "to 'promote the comity between state and federal courts that has been recognized as a bulwark of the federal system.'" *Kremer* v. *Chemical Construction Corp.*, 456 U.S. 461, 467 n.6 (1982), quoting *Allen* v. *McCurry*, 449 U.S. at 96. Such comity is particularly important when the prior decision involves admission to the state bar. The reasons this Court has recognized for minimizing federal court interference in the actions of a state judicial system relating to the membership of the state bar render inappropriate relitigation in a Sherman Act damage action of issues either determined adversely to disappointed bar applicants in state judicial proceedings or "inextricably intertwined" in such proceedings. *Feldman*, slip op. 25.

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In sum, while the court of appeals correctly concluded that dismissal on state action grounds was not warranted at this stage of the litigation, proper application of the state action doctrine in this case will neither impair the ability of states to delegate to subordinate agencies discretion in carrying out state policy nor impose antitrust liabilities on the members of those agencies for actions in furtherance of state policy.[36]

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see also Restatement (Second) of Judgments § 26 comment c, illustration 2 (1982). But cf. *Nash County Bd. of Education* v. *Biltmore Co.*, 640 F.2d 484 (4th Cir.), cert. denied, 454 U.S. 878 (1981).

In applying the rules of issues preclusion, the district court will first have to determine whether the consistency of the grading system with state policy was a matter actually decided in the state court proceeding. See *Russell* v. *Place*, 94 U.S. 606, 608 (1876). Since no hearing was held on respondent's application, there may also be a question whether the procedure employed in passing on the petition was adequate to warrant precluding relitigation. See Restatement (Second) of Judgments § 28(3).

[36] Petitioners also assert that this case presents the question whether the Committee's grading of the bar examination and its recommendations to the Arizona Supreme Court were immune from the Sherman Act under the *Noerr-Pennington* doctrine. See *Eastern*

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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Railroad Presidents Conference v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers* v. *Pennington*, 381 U.S. 657 (1965). But petitioners did not raise this issue in the lower courts (Pet. 18 n.9), nor was it passed on by the court of appeals. It is therefore not properly before this Court. *Adickes* v. *Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).

In any event, the anticompetitive agreement among the Committee members alleged by respondent is not only contrary to existing state policy (see page 19, *supra*), but apparently also unknown to the state Supreme Court—whose actions petitioners are purportedly attempting to influence. See Pet. App. A9. If it could be proved that the Committee in fact smuggled by the Supreme Court a protective quota on admissions in the guise of competence-related recommendations, such a sham would not be entitled to protection of the *Noerr-Pennington* doctrine. See *California Transport* v. *Trucking Unlimited*, 404 U.S. 508, 512-513 (1972); cf. *Israel* v. *Baxter Laboratories, Inc.*, 466 F.2d 272 (D.C. Cir. 1972); *Harman* v. *Valley National Bank*, 339 F.2d 564 (9th Cir. 1964). We doubt in any event whether the *Noerr-Pennington* doctrine would apply to the exercise of authority delegated by a state, particularly where—though it is phrased in the form of a recommendation—the authority is effectively final. Such an extension of *Noerr-Pennington* is not needed to secure the " 'right of petition * * * protected by the Bill of Rights,' " which this Court has found to underlie the doctrine. See *California Transport*, 404 U.S. at 510.

* The Solicitor General is disqualified in this case.

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